



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

12 April 2022

Aiofe
Right to Know

By email: foi+request-8409-3e8a955a@righttoknow.org.au

Dear Sir/Madam,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 11 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

In an article published in the Australian on 10 February 2022 (Top judge warned of registrar overhaul), the following is stated:

- a) *“Mr Soden had claimed the registrar, a man who had been at the court for many years, could not be given the original Senior Executive Service classification advertised because it would be vetoed by the APSC representative”;*
- b) *“Warwick tells me there is a problem because the (APSC) has a veto on an SES appointments”;*
- c) *“... the most senior registrar in Queensland ended up in a position lower than the SES classifications other state registrars were given”;*
- d) *“To solve the problem, Warwick wants to downgrade the role from an SES position, avoid the APSC’s veto and appoint (him)”;*
- e) *“Warwick’s advice that the APSC has a veto on appointment is wrong”;*
- f) *“Justice Greenwood confirmed he had been told that the APSC had objected to the man’s appointment because he ‘might not be accommodating of planned changes to the management structure of the court’”;*
- g) *“[The Registrar] was ultimately appointed to the role at the (lower level) configured by Mr Soden and Ms Lagos, no doubt in discussion with the APSC.”; and*
- h) *“A week after Justice Greenwood’s complaint about the registrar’s apparent demotion, an HR official wrote to the man to confirm they would use ‘an agency determination which varies your base salary’, giving him a pay rise.”*

Presumably, the reference to “the Registrar” is a reference to “the most senior registrar in Queensland [who] ended up in a position lower than the SES classifications other state registrars were given.” Perhaps the title is National Judicial Registrar (based on comments reproduced from Ms McMullan’s report).

The relevant selection exercise occurred somewhere about October 2018 according to the article.

I request access to:

- a) *the “agency determination” that varied the relevant registrar’s base salary;*
- b) *the written correspondence from the “HR official” confirming that the Court would use “an agency determination which varies [the registrar’s] base salary”;*
- c) *the vacancy notification published in the Public Service Gazette for the position that this registrar applied to fill;*
- d) *any other materials that constituted part of the recruitment documentation (for example, role descriptions, work level standards assessment etc); and*
- e) *any certification issued by the Australian Public Service Commissioner's representative noting that the selection process complied with the Public Service Act and the Australian Public Service Commissioner's Directions (formerly known as a section 21(b) certificate).*

Please provide the documents in digital format (e.g. PDF or Microsoft Word).

On 24 February 2022, the Court acknowledged receipt of your FOI request and advised you that, because your request covered documents that contained personal information about individuals, under section 27A of the FOI Act the Court was required to consult with the persons concerned before making a decision about the release of the documents. For that reason, the period for processing your request was extended by a further period of 30 days in accordance with subsection 15(6) of the FOI Act.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

Searches undertaken

Extensive searches were undertaken by senior staff in the Court’s People and Culture team, and other staff, to identify any documents falling within the scope of your request. These included searches of the Court’s human resources and recruitment inboxes, searches of staff emails, searches of the human resources shared drive, and searches of the Court’s electronic document, records management and information systems. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

As a result of the searches undertaken, seven (7) documents were identified as falling within the scope of your request. The table below lists those documents, in accordance with the relevant paragraphs of your request.

Paragraph (a)	<ul style="list-style-type: none">• Agency Determination
Paragraph (b)	<ul style="list-style-type: none">• Email correspondence regarding the Agency Determination
Paragraph (c)	<ul style="list-style-type: none">• Gazette Notice
Paragraph (d)	<ul style="list-style-type: none">• National Judicial Registrar and District Registrar position description

	<ul style="list-style-type: none"> • Selection Report • Judicial Registrar Document with handwritten notes
Paragraph (e)	<ul style="list-style-type: none"> • Commissioner's Representative Certificate

Decision

With respect to paragraph (a) of your request, I have decided to refuse access to that document on the basis that the document is exempt from disclosure under subsections 47E(c), 47E(d) and section 47F of the FOI Act. I consider that disclosure of the document would be contrary to the public interest under subsection 11A(5). I also consider that it would be futile to grant you access to a redacted copy of that document under section 22 of the FOI Act.

With respect to paragraph (b) of your request, together with two of the three documents found in response to paragraph (d) of your request (being the Selection Report and the Judicial Registrar Document with handwritten notes), I have decided to refuse access to those documents on the basis that the documents are exempt from disclosure under section 47C, subsections 47E(c), 47E(d) and section 47F of the FOI Act. I consider that disclosure of those documents would be contrary to the public interest under subsection 11A(5). I also consider that it would be futile to grant you access to redacted copies of those documents under section 22 of the FOI Act.

With respect to paragraph (c) of your request, I have decided to grant you access in full to the document found. I have also decided to grant you access in full to the balance of the documents found in response to paragraph (d) of your request, being the National Judicial Registrar and District Registrar position description.

With respect to paragraph (e) of your request, I have decided to grant you access to the document requested, with minor redactions made to that document with respect to information that is conditionally exempt under section 47F of the FOI Act and for which disclosure would be contrary to the public interest under subsection 11A(5) of the FOI Act.

I have taken the following into account in making my decision:

- the terms of your request;
- the nature and content of the documents sought by your request;
- the relevant provisions of the FOI Act and relevant case law;
- the third party submissions received following consultations under section 27A of the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for Decision

Deliberative processes – s 47C of the FOI Act

Paragraph (b) and part of paragraph (d) of your request

I consider that the email correspondence regarding the Agency Determination (captured by paragraph (b) of your request), and the Selection Report and Judicial Registrar Document with handwritten notes (captured by paragraph (d) of your request), are conditionally exempt under section 47C of the FOI Act. Subsection 47C(1) of the FOI Act prescribes that:

A document is conditionally exempt if its disclosure under this Act would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

In relation to requests that concern conditionally exempt documents containing deliberative matter, the FOI Guidelines provides the following at 6.52:

... Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).*

Relevantly, the FOI Guidelines also provide:

6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.58 A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹

¹ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

6.59 *'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.*²

6.60 *The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.*³

6.61 *A deliberative process may include the recording or exchange of:*

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations.* [footnote omitted].

I have assessed the relevant documents and consider that they relate to deliberative matter or are in the nature of a deliberative process. In particular, the documents record exchanges of advice, opinions, proposals and interim decisions or deliberations in the process of engaging or promoting a public servant. The documents are preparatory and ancillary to the formal engagement of that employee, which took the form of an Agency Determination between that employee and the Court. The recordings and/or exchanges took place prior to the making of a final decision regarding the recruitment exercise in question and are clearly part of a wider deliberative process of the Court regarding recruitment.

In particular, the Judicial Registrar Document with handwritten notes includes notes that have been recorded in handwriting which, whilst no means determinative that the document is in fact a draft, does indicate that the document is not a “*record of, or formal statement of reasons for, a final decision given in the exercise of a power or of an adjudicative function*”, which would preclude it from the application of this conditional exemption (see paragraph 47C(3)(c) of the FOI Act). In fact, the handwriting itself notes that the advice, opinions and recommendations are “*subject to*” further approval. In my view, this document clearly contains deliberative matter.

For the reasons outlined above, I find that disclosure of the email correspondence regarding the Agency Determination, the Selection Report, and the Judicial Registrar Document with

² *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

³ See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

handwritten notes would disclose deliberative matter and, for this reason, those documents are conditionally exempt under subsection 47C(1) of the FOI Act.

In finding that those documents are conditionally exempt under section 47C of the FOI Act, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this later in my decision.

Certain operations of agencies – s 47E of the FOI Act

Paragraphs (a) and (b), and part of paragraph (d) of your request

I consider that those same three documents discussed in relation to section 47C above, being the email correspondence regarding the Agency Determination, the Selection Report, and the Judicial Registrar Document with handwritten notes, together with the Agency Determination itself, are conditionally exempt under paragraphs 47E(c) and 47E(d) of the FOI Act, which prescribe that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provide the following elaboration on paragraph 47E(c):

6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

6.114 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

All of the documents in question clearly relate to the “*management of personnel*”, given that the documents all concern the Court’s recruitment processes. The Selection Report and Judicial Registrar Document with handwritten notes contain comparative assessments about job candidates, and the Agency Determination provides for remuneration for a particular

employee in a manner that reflects the skills, knowledge, experience and attributes of that employee. For this reason, the documents also relate to the “*assessment of personnel*”.

The FOI Guidelines provide the following elaboration on paragraph 47E(d):

6.123 The predicted effect must bear on the agency’s ‘proper and efficient’ operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

In addition to relating to the management and assessment of personnel, the documents also relate to the “*efficient conduct of the operations*” of the Court, given that each of the documents concerns recruitment processes which are essential to the proper and efficient operation of the Court. Further, the documents contain personal information about Registrars of the Court who are critical to the Court’s proper and efficient operations. Registrars provide support to the Court’s Judges, as well as exercising various powers delegated by Judges and performing important statutory functions assigned to them by legislation.

I now turn to the question of whether disclosure of the documents would or could reasonably be expected to have a substantial adverse effect on the management and assessment of Court staff and on the Court’s proper and efficient conduct of operations.

The release of recruitment information in respect of a particular employee, and/or the release of any part of the specific terms of employment negotiated for that employee, would reasonably be expected to have a substantial adverse effect on the management and assessment of personnel by the Court, as well as on the Court’s operations, by:

- destroying trust in the confidentiality of negotiations between employees/prospective employees and the Court;
- destroying trust in the Court’s confidential recruitment processes;
- undermining the expectations of Court employees regarding the protection of their privacy and the confidentiality of the terms of their employment;
- lowering the morale of employees and leading to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- discouraging future external and internal candidates from applying for job vacancies or promotions at the Court on the basis that candidates will not have confidence that their individual employment arrangements will remain confidential;
- discouraging employees and prospective employees from seeking to pursue the additional benefits conferred by Agency Determinations, or through other means;
- deterring candidates from applying for vacancies or promotions at the Court in future;
- permitting remuneration comparisons between former and/or current employees of the Court and thus creating tension and potential animosity between employees; and

- exposing the relevant person to the risk of having their personal details and the circumstances of their recruitment with the Court being the subject of further media attention.

Each of the relevant documents were brought into existence in a confidential manner, whereby the particular employee negotiated the terms of their employment directly, and on an individual basis, with the Court, and did so following a confidential recruitment process which compared that employee, including their personal skills and attributes, against other candidates.

Further to what is discussed above concerning the confidentiality of recruitment and employee engagement processes, I note that the person I consulted in relation to the Agency Determination strongly objected to disclosure of their remuneration. It was clear from that consultation that the employee entered into the Agency Determination and related email communications with the Court on the understanding that their salary would not be communicated to third parties and, furthermore, would not be made publically available on a website (whether that be via the Right to Know website or the Court's FOI disclosure log). In this regard, it is apparent that disclosure of the relevant recruitment documents would likely limit the ability of individuals and the Court to enter into similar communications or agreements in the future, and would ultimately have a substantial adverse effect on employee trust and confidence in the Court's recruitment processes.

Similarly, I consider that other former and existing employees who have applied for positions at the Court would have every expectation that the details of their recruitment processes and, if successful, their terms of engagement with the Court would remain confidential. The assessment of each candidate contained within the Selection Report includes information regarding the candidate's weaknesses and/or areas for development. Such information is especially private and sensitive and its release could reasonably be expected to create tension amongst employees of the Court by permitting comparisons between individuals and, potentially, undermining the leadership of any such employees who are engaged in senior/managerial roles at the Court. The disclosure of the Selection Report would prejudice the protection of the employees' right to privacy and would potentially result in a deterioration of the morale and productivity of the relevant employees.

In relation to employee expectations of confidentiality and privacy discussed above, I note that there is no legislative or regulatory regime that requires the disclosure of the documents requested.⁴ Rather, disclosure of the information requested would likely breach the Court's obligations in respect of privacy and confidentiality of employee records.

For the reasons outlined above, I consider that the documents captured by paragraphs (a), (b), and part of (d) (being the Selection Report and the Judicial Registrar Document with handwritten notes) of your request, relate to the operations of the Court and, if disclosed, would or could reasonably be expected to have a substantial adverse effect on both the "*management*

⁴ Noting that general remuneration details are published in the Court's Annual Report in relation to each classification level.

or assessment” of personnel and the “proper and efficient conduct of the operations” of the Court. Accordingly, I have determined that these documents are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act.

In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this later in my decision.

Personal privacy – s 47F of the FOI Act

Paragraphs (a), (b) and (e), and part of paragraph (d) of your request

I consider that the documents that fall within the scope of paragraphs (a), (b) and (e) of your request, as well as the documents captured by part of paragraph (d) of your request (being the Selection Report and the Judicial Registrar Document with handwritten notes) are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act, which prescribes that:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The term “personal information” is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the *Privacy Act 1988* (Cth), that is:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in material form or not.

Most of the documents you have requested contain one or more pieces of “personal information”, including the names of public servants or people who applied for roles within the public service and were unsuccessful, comments on individual attributes or suitability for roles, salary information, direct contact details of former or current Court employees, and signatures of public servants.

To determine whether this personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

Subsection 47F(2) of the FOI Act prescribes that:

In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

(a) the extent to which the information is well known;

- (b) *whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- (c) *the availability of the information from publicly accessible sources;*
- (d) *any other matters that the agency or Minister considers relevant.*

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

...whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

The FOI Guidelines list at paragraph 6.143 additional factors, which are outlined in the leading Information Commissioner review decision on section 47F. In that decision, *'FG' and National Archives of Australia* [2015] AICmr 26, the Information Commissioner held that the following factors are relevant to the question of whether disclosure would be unreasonable:

- *the nature, age and current relevance of the information*
- *any detriment that disclosure may cause to the person to whom the information relates*
- *any opposition to disclosure expressed or likely to be held by that person*
- *the circumstances of an agency's collection and use of the information*
- *the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act*
- *any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and*
- *whether disclosure of the information might advance the public interest in government transparency and integrity.*

In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines further provide, at paragraphs 6.144 and 6.145:

For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that '... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable'. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).

Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have

reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.

Names of public servants

The name of the Registrar discussed in the media article is contained in the Agency Determination, Selection Report, and Judicial Registrar Document with handwritten notes as found in response to paragraphs (a) and (d) of your request. That Registrar's name is not identified in the article, nor is that Registrar personally identified in your request, given your reference them as "[p]resumably... 'the most senior registrar in Queensland...' Perhaps the title is National Judicial Registrar". I am not satisfied that there exists or should exist any presumption that the Registrar's name in the documents should be released merely because that person is or was an employee of the Court and a public servant. The personal information is not information about the performance of that person's usual duties or responsibilities in the Court. Rather, that information is included in the documents including as a product of confidential communications between that person and the Court in relation to the terms of that person's employment.

Moreover, I consider that release of this person's name would link them to the allegations set out in the media article and expose them to the risk of having their personal details and the circumstances of their recruitment with the Court being the subject of further media articles. I consider that release of the Registrar's name is not well known, at least in relation to the matters set out in the media article, and that disclosure of their name would cause that person stress and detriment. I consider that disclosure of the Registrar's name would ultimately prejudice that person's right to privacy and is personal information that would be unreasonable to disclose.

Salary and classification level of the Registrar in question

The Agency Determination details the precise salary of the Registrar in question. The Registrar was consulted under section 27A of the FOI Act and strongly objected to the release of their salary. Their reasons for objection included:

- the information relates to their personal financial affairs, which is protected from release under various legislative instruments, and is information which the Australian community would regard as sensitive;
- the information is not a matter of public knowledge, nor is it able to be ascertained from publicly accessible sources.

I consider that the reasons listed above are well-founded and I give considerable weight to each of them in determining whether disclosure of the personal information would be unreasonable.

The remuneration contained in the Agency Determination is personal financial information that was negotiated between the relevant employee and the Court on the understanding that such information would be kept confidential and would not be disclosed to third parties or made publically available on a website. The Court has significant obligations with respect to the confidentiality of employee records, including those relating to remuneration. Individual salary information is not disclosed to anyone other than authorised staff, the Australian Taxation Office where required by law, or to the relevant employee themselves. There are no other statutory disclosure frameworks that require release of that information. I consider that disclosure of the precise salary of that employee would not contribute to the effective oversight of government expenditure any more than the general remuneration details that are published in the Court's Annual Report, which you are already able to access.

In addition, the classification level of the Registrar in question can be considered "*personal information*" as classification levels link to particular salary levels in the Australian Public Service. Rather than simply being a classification level for a particular designated position within the Court, the Registrar in question is identifiable, at least amongst staff at the Court. Therefore, revealing the Registrar's classification level reveals, in effect, the classification level of an individual known at the Court, which has the potential to adversely impact that Registrar's professional standing and relationships with colleagues.

The recent publication of articles in *The Australian* concerning the Court's recruitment practices in 2018 exacerbates the likelihood and seriousness of any detriment to be caused by the release of this personal information. It is possible that further media articles may flow from disclosure of the Agency Determination and, consequently, result in stress and anxiety for the individual concerned.

In relation to any detriment that disclosure of the salary could cause to the individual to whom the information relates, I consider it highly likely that the effects would, or could reasonably be expected, to destroy that individual's trust and confidence in the confidentiality of negotiations. Disclosure could create stress and anxiety for the individual concerned and cause tension and disharmony in the workplace by permitting comparisons between former and/or current employees.

For all of the above reasons, I consider that release of the Registrar's salary and classification level is personal information that would be unreasonable to disclose.

Direct contact details of Court staff

As already mentioned above, I have decided to grant you access in full to the Gazette Notice and National Judicial Registrar and District Registrar position description which were some of the documents you requested in paragraphs (c) and (d) of your request. I have granted you full access to those documents because I am satisfied that the name and direct work contact details of a particular public servant, which appears in those documents, is included in those documents because of that person's usual duties or responsibilities. I also have regard to the fact that the documents containing that personal information were, at some stage, available

from publicly accessible sources. I did not receive any objections to the release of that personal information and nor do I consider that personal information unreasonable to disclose noting, in particular, that the direct work number contained within the documents is no longer in use by that public servant.

Conversely, the email correspondence regarding the Agency Determination, found in response to paragraph (b) of your request, includes the direct work email addresses and telephone number of various Court staff. Such direct contact details are generally not well-known nor available from publicly accessible sources.

In *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020), Deputy President S A Forgie considered that “[p]ublication of the names of [public servants] is one thing but revealing telephone numbers that give direct access to them is another”. Paragraphs [129]-[130] of that decision provide:

In Colakovski, telephone numbers were considered to be “personal affairs” of a person as they would reveal the identity of the caller and, in the circumstances of that case, the reason for making the call. The definition of “personal information” no longer incorporates a reference to personal affairs. It now means, in part, “information ... about an identified individual ...”. I find that a telephone number is about an individual in the sense that it identifies a means by which communication may be made with that individual. That is so whether it is a personal mobile or landline telephone number or a telephone number made available through an individual’s place of employment.

An individual may include his or her direct telephone number in correspondence directed to other persons. Unless published on an agency’s website or made public in some other way, such as on a pamphlet or report available to the public, I consider that disclosure of an individual’s telephone number in his or her place of employment is unreasonable. Its disclosure will provide an avenue by which others may choose to express their displeasure with the individual or with that for which he or she is responsible but its disclosure does not make any positive contribution to increasing public participation in Government processes or in increasing scrutiny, discussion, comment and review of the Government’s activities.

In my view, disclosure of the direct contact numbers of the public servants in question is personal information that would be unreasonable to disclose. I consider this to also be the case for the direct email addresses for those public servants. Disclosure of the direct contact details of Court staff could expose them to unsolicited and inappropriate approaches by parties external to the Court, causing direct contact to be made to them directly, despite the existence of more appropriate channels within the Court designed specifically for receiving and actioning general calls and enquiries. Further, this personal information is not relevant to the FOI request and has not been specifically requested by the applicant. Although the personal information is included in the documents because of these people’s usual duties or responsibilities, I consider that, in the circumstances, such direct contact information is unreasonable to disclose.

Moreover, I am of the view that the level of attention brought about by the articles published in *The Australian* mean that the privacy of individuals could reasonably be expected to be

interfered with if the employees in question had their direct email addresses or telephone numbers disclosed.

Signatures of public officials

The Selection Report and Commissioner's Representative Certificate contain signatures of public servants. Unlike the Agency Determination, which contains the signature of the, then, Agency Head of the Court (where an electronic copy of that signature was affixed to every document that was filed in the Court during that person's term of office, as well as many other publicly accessible documents), the signatures in these other documents are not well known nor available from publicly accessible sources, as far as I am aware. In my view, disclosure of the signature of individual public servants in this context increases the risk of the misuse of those signatures which, if it occurred, would likely cause substantial distress and/or harm to those individuals.

In the decision of *Colin James Corkin and Department of Immigration and Ethnic Affairs* [1984] AATA 448 (16 October 1984), the Hon. Sir William Prentice (Senior Member) found at paragraph [14] as follows:

The signature is of paramount importance in one's activities in banking and financial matters, correspondence, the making of applications, the giving of receipts... The maker of a signature does not readily make it available to others who might take advantage of its possession to imitate it without permission. It is I consider, in an especially marked way - private to the individual, one's own. Its making, its characteristics, its privacy constitute part of the individual's pursuits of life, his commercial, professional and public business. I take it to be part of his "personal affairs" as much as the contents of his wallet, his credit cards, his private correspondence; and I find therefore that its release to the applicant would amount to the disclosure of information relating to the personal affairs of the person named.

Having regard to the above, I consider that, in these circumstances, disclosure of the signature of the public servant in the Commissioner's Representative certificate would be an unreasonable disclosure of personal information.

Additional considerations

In addition to all of the above considerations, in determining whether any of the abovementioned personal information would be unreasonable to disclose, the fact that the FOI Act "does not control or restrict any subsequent use or dissemination of information released" (per paragraph 6.143 of the FOI Guidelines above) is also an important consideration. In *'BA' and Merit Protection Commissioner* [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner held at paragraph 81:

... the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information ... Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant

that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.

I have identified above the personal information in the documents that I consider would be unreasonable to disclose and that, as a result, the Agency Determination, email correspondence regarding the Agency Determination, Judicial Registrar Document with handwritten notes, Selection Report and Commissioner's Representative Certificate are conditionally exempt under section 47F of the FOI Act. I am of this view including because the release of such information into the public domain has the potential to cause considerable harm and distress for the people concerned.

In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this below.

Public interest test

In finding that the documents found in response to paragraphs (a), (b), (e) and part of paragraph (d) of your request are conditionally exempt under sections 47C, 47E and/or 47F of the FOI Act, I must now consider whether, as a result of subsection 11A(5) of the Act, it would be contrary to the public interest to give you access at this time. In this regard, subsection 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Subsection 11B(3) of the FOI Act lists factors that must be taken into account in considering the public interest test as follows:

Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) inform debate on a matter of public importance;*
- (c) promote effective oversight of public expenditure;*
- (d) allow a person to access his or her own personal information.*

Subsection 11B(4) of the FOI Act lists factors that must not be taken into account in deciding whether access would be in the public interest. I have not considered those factors.

The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19) and against disclosure (see paragraph 6.22) that may be relevant in certain circumstances. Included in the factors weighing against disclosure in paragraph 6.22 of the FOI Guidelines are the following:

- (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information*

(i) *could reasonably be expected to prejudice an agency's ability to obtain similar information in the future*

...

(k) *could reasonably be expected to harm the interests of an individual or group of individuals*

...

(n) *could reasonably be expected to prejudice the management function of an agency*

In relation to the harm that may result from disclosure, the FOI Guidelines state at paragraphs 6.20 and 6.21:

The FOI Act does not list any factors weighing against disclosure. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the application of public interest factors that may be relevant in each particular case.

Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.

Having regard to all of the relevant factors, I accept that disclosure of the documents found might broadly promote the objects of the FOI Act by providing to the Australian community access to information held by the Government, increasing knowledge about Government activities, and enhancing the scrutiny of Government decision-making.

In relation to disclosure of the Agency Determination, I also accept that disclosure might promote oversight of public expenditure. However, I consider that disclosure of the remuneration for one particular employee would not serve the public interest any more than the general remuneration details that are publicly accessible in the Court's Annual Report. Little weight should, therefore, be given to this factor.

There are several factors, many of which have already been identified, that weigh against a finding that it would be in the public interest to disclose such information. The factors against disclosure are that it could reasonably be expected to:

- prejudice the protection of the individual right to privacy;
- prejudice the management function of the Court by destroying trust in the Court's recruitment processes and the confidentiality of negotiations between employees/prospective employees and the Court;
- substantially affect the operations of the Court in terms of its ability to recruit and retain personnel;
- in relation to the release of the Registrar's name, damage that individual's relationship with former or current colleagues;

- cause distress and anxiety for that individual in relation to media attention that may follow the release of the documents;
- negatively impact the ability of public servants to perform their current roles;
- in relation to the release of contact details of public servants, adversely affect the wellbeing of those public servants, by causing them stress and anxiety;
- lead to deterioration in employee productivity and performance due to the increased risk of an influx of emails or calls from the public;
- in relation to the release of signatures, expose those individuals to an increased risk of fraud and/or identity theft;
- permit remuneration comparisons between former and current employees of the Court and, consequently, create tension and animosity in the workplace; and
- harm the interests of the particular individual concerned, including in relation to their individual wellbeing and their relationships with former or current colleagues.

Paragraph 6.5 of the FOI Guideline provides elaboration on the public interest test including, relevantly, that the public interest is “*not something of interest to the public, but in the interest of the public*”.⁵ I am unable to see how information regarding a particular Registrar’s name, their salary & classification level, selection panel opinions about candidates, attributes and suitability of individual candidates, the direct contact details of Court staff or the signatures of public servants – all of which are personal and unique to the people concerned – would be of serious concern or benefit to the public. Disclosure of personal information of that nature would, in my view, merely serve to satisfy the curiosity of others.

I consider that the factors against disclosure (set out above) carry with them a very real and grave risk of harm to the Court and its former or current employees should the personal information in the documents be released. I give significant weight to each of the above factors and, after considering each factor and the weight to be given to each, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information.

Accordingly, I give the factors against disclosure greater weight than the factors favouring disclosure. I am satisfied that disclosure of the personal information in the documents would, on balance, be contrary to the public interest.

Deletion of exempt matter or irrelevant material – s 22 of the FOI Act

Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

⁵ See also *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186, at [188] (Griffiths CJ).

Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions discussed above, the documents relating to paragraphs (a) (Agency Determination), (b) (email correspondence regarding the Agency Determination), and two of the three documents relating to paragraph (d) of your request (the Selection Report and the Judicial Registrar Document with handwritten notes), retain no value or meaning. It would therefore be futile to grant you access to redacted copies of those documents.

In relation to the document found in response to paragraph (e) of your request that I have determined is exempt from disclosure under the FOI Act, I have decided that it is possible to prepare an edited version of that document with exempt matter deleted. To recap, that exempt material is the signature of a public servant. Granting you access to redacted copies of that document allows exempt material to be protected while, at the same time, promoting the objects of the FOI Act by providing you with access to meaningful information.

Access Format

Your request says “*Please provide the documents in digital format (e.g. PDF or Microsoft Word)*”. I have therefore decided to grant you access to the following documents in PDF format and release those documents to you by email:

1. Gazette Notice;
2. National Judicial Registrar and District Registrar position description; and
3. Commissioner’s Representative Certificate (redacted).

The three documents listed above accompany this letter.

Charges

You have not been charged for the processing of your request.

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely,



C Hammerton Cole
Registrar